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JAMES D. MAHER,
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In the Supreme Court of the United States

OCTOBER TERM, 1919.

No. 874

FIRST NATIONAL BANK OF JASPER, FLORIDA,
a Corporation, Petitioner,

vs.

THE FIRST NATIONAL BANK OF ROME,
a Corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

WILLIAM WADE HAMPTON,
Attorney for Petitioner,
Gainesville, Fla.

HILTON S. HAMPTON
AND S. S. SANFORD,
Of Counsel,
Tampa, Fla.

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UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

WILLIAM WADE HAMPTON,
Attorney for Petitioner,
Gainesville, Fla.

HILTON S. HAMPTON
AND S. S. SANFORD,
Of Counsel,
Tampa, Fla.

NOTICE TO COUNSEL

To Messrs. William E. Kay, John L. Doggett, L. A. Dean, I. E. Dean and Henry C. Clark, Counsel of Record in the Circuit Court of Appeals for the Respondent herein:

Please take notice that on Monday, the 4 day of October, A. D. 1920, at the opening of court on that day, or as soon thereafter as petitioner may be heard, we shall submit to the Supreme Court of the United States, at its court room in the Capitol in the city of Washington, the following petition for a writ of certiorari in the case there entitled together with the brief in support thereof accompanying the same.

Dated at Tampa, Florida, this 28 day of August, 1920.

WM. WADE HAMPTON,
Attorney for Petitioner.

Service of the foregoing notice, together with a copy of the accompanying petition and brief, is hereby accepted.

.....
Of Counsel for Respondent.

IN THE SUPREME COURT OF THE
UNITED STATES.

OCTOBER TERM, 1919.

No.....

FIRST NATIONAL BANK OF JASPER, FLORIDA,
a Corporation, Petitioner,

vs.

THE FIRST NATIONAL BANK OF ROME,
a Corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States

The petition of The First National Bank of Jasper, Florida, a corporation, respectfully shows unto this Honorable Court as follows:

FIRST: This cause involves a conflict between the Supreme Court of the State of Florida and the United States Circuit Court of Appeals in and for the Fifth Circuit.

SECOND: This cause was instituted against your petitioner in the United States District Court in and for the Southern District of Florida on the 27th day of January, A. D. 1913, by the respondent herein, seeking to recover on certain certificates of deposit issued by your petitioner (Transcript p. 1). The jurisdiction of the trial court was based on diversity of citizenship. (Transcript p. 3).

THIRD: Prior to the institution of this action in the United States District Court as aforesaid on to-wit the 3rd day of January, A. D. 1913, there were filed in the Circuit Court in and for Hamilton County, Florida, a court of general jurisdiction, bills of complaint by J. H. Corbitt and others, in separate suits, against Rome Insurance Company, American Bank and Trust Company, and First National Bank of Rome, Georgia, and against your petitioner, (Transcript p. 70); that in and by said bills of complaint it was prayed that certain certificates of deposit (being the same certificates of deposit sued on in this cause) be declared to be null and void, and that your petitioner be restrained from paying the proceeds thereof to respondent in this cause, or any one for it (Transcript p. 77); that said certificates of deposit (Transcript p. 8) are identical in all respects save the numbers thereof and the amounts vary, and the names of the persons depositing the proceeds of same, said certificates being in words and figures following, to-wit:

CERTIFICATE OF DEPOSIT.

No. 895.

Jasper, Fla., Nov. 25, 1911.

THE FIRST NATIONAL BANK, JASPER, FLA.

This certifies that.....has deposited in this Bank.....Dollars, payable to the order of American Bank and Trust Co.,

Trustee, Rome, Ga. in current funds on return of this certificate properly endorsed with interest at four per cent per annum (not over.....Dollars)). No interest paid for fraction of a month. Not payable until Nov.....1912.

C. GILBERT, Cashier.

$.....

$.....

That in said suits in the said circuit court in and for Hamilton County, Florida, service of process was had upon Respondent (the original plaintiff herein) by publication, under the provisions of Section 1866 General Statutes of Florida and Chap. 5913 Laws of Florida 1909 (Transcript p. 66); that your petitioner, a resident of the State of Florida, was personally served with process.

That upon the return day fixed in the order of publication of process, Respondent (Original plaintiff herein) filed special appearances and motions to quash the service (Transcript p. 52) which motions were in substance confined to the one ground that the proceedings brought in the state court were actions *in personam* and that there had been no personal service on said Respondent. These motions having come on to be heard before the Circuit Court of Hamilton County, Florida, said court on the 3rd day of April, A. D. 1913, did deny said motions.

Thereupon, on the 10th day of April, A. D. 1913, stipulations were entered into between solicitors for the respective parties in the suits in the State court (Transcript p. 102) providing that all proceedings in said suits be stayed pending the prosecution of an appeal to the Supreme Court of Florida in the case of J. H. Corbitt vs Rome Insurance Company, et als., which appeal was from orders of the State court denying similar motions to quash service by publication on similar grounds, and which appeal under the decisions of the Supreme Court of Florida constituted a general appear-

ance by the appellant (Respondents herein); and it was further provided in and by said stipulation (Transcript p. 102) that the ultimate decision of the said appeal in said case of J. H. Corbitt vs Rome Insurance Company, et als., would be decisive of the validity of the service by publication on the defendants in those suits.

That at the June term of the Supreme Court of Florida, said Supreme Court affirmed the order of the lower court in the case of J. H. Corbitt vs Rome Insurance Company, et als., (Transcript p. 96) in words and figures a sfollows, to-wit:

"In the Supreme Court of Florida,
June Term, A. D. 1913.

"Rome Insurance Company, a Georgia Corporation, and other Appellants,
vs.
J. H. Corbitt, Appellee.
Hamilton County.

COCKREL, J.:

"A bill was filed in the Circuit Court for Hamilton County against local defendants and also certain non-residents corporations seeking to impound a fund in that county arising out of an alleged fraudulent transaction consummated in that county. Constructive service, in perfect accordance with the statute was had by publication, and the non-residents corporations appeared specially to quash the service upon the theory that the sole relief prayed was *in personam*, and that therefore the statute authorizing constructive service by publication does not apply. This motion having been denied these non-residents have sued out what they term a special appeal.

"It may well be that this appeal so operates as a general appearance in the circuit court as to render the question before us a moot one, but the Appellee does not ask us to so hold, and it appears that this is but a test case, upon the decision of which many other cases in that court are depending.

"The bill confined its prayer to an adjudication of the funds sought to be impounded, and does not pray for a general personal decree against these non-residents

and we are not to assume from the face of the bill that the Circuit Court will enter an unauthorized decree; and we have not before us any such question of jurisdiction as was involved in the case of Pennoyer vs Neff, 95 U. S., 714.

82. "The purpose of the statute authorizing constructive service by publication is to notify non-residents of the pending suit so that they may, if they care to do so, come into the case and if the statute be followed, there is no right in the non-resident to quash this notice; he has his right if not waived to object should the court thereafter commit an error against him.

"Our constructive service statute is broad enough to apply to any suit in equity pending in our Circuit Court, and as has been said in Kilpatrick vs Post, 53 N. J. Eq., 591 text 597 32 Atl. Rep. 267, cannot be confined in its operation to the cases where the court might make final decree or judgment. Further that Court says: 'It was not intended that the question of the power to enter the ultimate decree or judgment should enter into the question of the right to give notice of the suit to a non-resident, or that this question of jurisdiction should be settled on a motion to discharge the order of publication. The complainant is entitled to have the question of jurisdiction settled by a final decree.'

"We are not to be understood as holding that the court might not quash a service by publication, if the bill upon its face showed that it was clearly a common law cause of action, and that the resort to the equity side of the court was a subterfuge; the bill before us does not present that case."

"The Order is affirmed:

"Shackleford, C. J. and Taylor, Hocker and Whitfield, J. J. concur."

That thereafter Respondent herein took no further part in the proceedings in the State Court (Transcript p. 29) and on the 14th day of July, A. D. 1914, final decrees were entered in the state court (Transcript p 29) which decrees adjudged that the certificates of deposits therein mentioned (being the same certificates of deposit herein sued upon) were void and of no effect

and enjoining your petitioner from paying the proceeds thereof to Respondent herein or to any one for it; that said decrees and each of them are still of full force and effect.

FOURTH: That on the 3rd day of August, A. D. 1914, in this suit instituted in the United States District Court in and for the Southern District of Florida by Respondent herein against your petitioner, your petitioner did file pleas of *res adjudicata,* (Transcript p. 10) setting up the decrees entered in the Circuit Court in and for Hamilton County, Florida, which decrees adjudged the certificates of deposit herein sued upon to be void and of no effect, and which enjoined your petitioner from paying the proceeds thereof to the plaintiff below (Respondent herein) or to any one for it. Certified copies of said decrees were attached to said pleas (Transcript p. 29).

FIFTH: That on the 7th day of September, A. D. 1914, the plaintiff in the trial court, Respondent herein, filed a demurrer to said pleas (Transcript p. 38) which said demurrer coming on to be heard before the District Judge of said Court, was on the 12th day of January, A. D. 1915, over-ruled, (Transcript p. 41).

SIXTH: That thereafter, on the 15th day of June, A. D. 1915, said Respondent filed replications to said pleas, (Transcript p. 47) setting up in substance by said replications that the chancery suits mentioned in your petitioner's pleas, and which are fully described in the third paragraph of this petition, were action *in personam;* that no personal service was ever had on said Respondent herein; that it did not at any time or any manner appear in said suits, except specially, to contest the service by publication therein made, and that it in no way waived the want of jurisdiction of the State court over its person; there were attached to said replication copies of the records in the said Chancery suits mentioned, (Transcript p. 57 to 115).

SEVENTH: That on the 5th day of July, A. D. 1915, your petitioner filed a motion to strike (Transcript p. 108) and a demurrer (Transcript p. 109) to said replications which said motion and demurrer coming on to be heard by the Court, the said demurrer was, on the 2nd day of February, A. D. 1917, sustained as to each of said replications (Transcript p. 115).

EIGHTH: That on the 9th day of January, A. D. 1919, the plaintiff in the trial court filed a declination to plead further (Transcript p. 117). Thereupon on the 9th day of January, A. D. 1919, final judgment was entered in favor of your petitioner (Transcript p. 119).

NINTH: That from said judgment said Respondent sued out a writ of error to the Circuit Court of Appeals of the United States for the Fifth Circuit which court on the 10th day of March, A. D. 1920, reversed the judgment of the District Court, holding in effect:

(a) That the Circuit Court in and for Hamilton County, Florida, acquired no jurisdiction over the person of respondent herein, by the service by publication made in said suits.

(b) That said Circuit Court in and for Hamilton County, Florida, acquired no jurisdiction over the fund or *res* sought to be impounded in said chancery suits, as the same was not under the control of the Court.

(c) That the Florida Court had no jurisdiction to render the said decrees as to non-residents.

(d) That the said court did not purport to determine the personal liability of your petitioner to the plaintiff on the said certificates of deposit.

(e) That the prosecution of the appeals by the respondent herein to the Florida Supreme Court, did not amount to general appearances in the State Court of Florida and this holding is in conflict with the decision of the Supreme Court of Florida.

TENTH: That a certified copy of the entire record in this cause in the Circuit Court of Appeals of the United States for the Fifth Circuit is hereby furnished, attached hereto and made a part of this petition, and marked Exhibit "A," all in compliance with Rule 37 of this Honorable Court.

ELEVENTH: Your petitioner is advised and believes that the aforesaid judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous, and that this honorable court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such case made and provided, said case being final in said United States Circuit Court of Appeals by the provisions contained in Section 128 of the United States Judicial Code.

TWELFTH: Your petitioner further represents unto this Honorable Court that the aforesaid judgment of the United States Circuit Court of Appeals for the Fifth Circuit presents a conflict of State and Federal jurisdiction and in effect reverses the decisions of the Supreme Court of the State of Florida in the cases of Rome Insurance Company, et als., vs B. F. Carter (63 Sou. 834) and Rome Insurance Company et als. vs J. H. Corbitt, (63 Fla. 833) and denies them full faith and credit, for the following reasons:

(a) The United States Circuit Court of Appeals held that the prosecutions of the appeals in the State Court did not amount to general appearances, whereas the Florida Supreme Court, following the established rule of practice in that State, held that the prosecution of an appeal constitutes a general appearance in the lower court.

(b) The Florida Supreme Court held that the service of publication upon Respondent herein original plaintiff in this action, was valid so as to bring its person within the jurisdiction of the court for the relief

prayed in the bills of complaint. The Circuit Court of Appeals held otherwise.

(c) The Florida Supreme Court held that the bills of complaint confined their prayers to an adjudication of a fund sought to be impounded, and that said fund was within the jurisdiction and control of the State Court; the said Circuit Court of Appeals by its decree in effect denies this.

THIRTEENTH: Your petitioner further represents that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous on the following grounds:

(a) The fund impounded by the decrees in the State Court had its *situs* in the State of Florida, and not in the State of Georgia;
because:

(aa) The money was not to be payable except "on the return of this certificate properly endorsed."

(bb) The certificate was not subject to check.

(cc) The deposit was made for a specific purpose and was not the part of a general fund.

(dd) The *situs* of a debt, for the purpose of administration and garnishment, is the home of the debtor.

(b) The proceedings in the State Court, the decrees in which were set up as a defense by your petitioner in the District Court, were proceedings *in rem*, to the validity of which personal service is unnecessary.

(c) If any defects existed in the State Court's jurisdiction over Respondent, such defects, under the rulings of the Supreme Court of Florida, were waived by the prosecution of the appeal to the Florida Supreme Court.

FOURTEENTH: Your petitioner further represents that no question was raised by the plaintiff, either in the District Court or in the Circuit Court of Appeals as to the sufficiency of your petitioner's pleas of *res adjudicata*, except that the proceedings in the State Court were actions *in personam* and that no personal service was had on the plaintiff, one of the defendants in those proceedings.

FIFTEENTH: Your petitioner further represents that the said United States Circuit Court of Appeals for the Fifth Circuit in denying to your petitioner the benefit of the adjudication of the Supreme Court of Florida of a statute of that state, assumed a jurisdiction which not even the Supreme Court of the United States has power to assume.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals in and for the Fifth Circuit, commanding the said court to certify and send to this Court, on a day certain therein to be designated, a full and complete transcript of the record and all proceedings of the said cause against said respondent, to the end that the said case may be reviewed and determined by this court, as provided in and by Section 240 of the United States Judicial Code, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with said provision of the Judicial Code, and that the said judgment of said Circuit Court of Appeals in said case, and every part thereof, may be reversed by this Honorable Court.

And petitioner will ever pray, etc.

Tom Wade Hamilton

Attorney and Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

THE FIRST NATIONAL BANK OF JASPER, FLORIDA,
Petitioner

vs.

FIRST NATIONAL BANK OF ROME, GEORGIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE UNITED STATES FOR FIFTH CIRCUIT

BRIEF OF PETITIONER, FIRST NATIONAL BANK OF JASPER, FLORIDA.

STATEMENT

The foregoing is a cause originating in the District Court of the United States for the Southern District of Florida, wherein First National Bank of Rome, Georgia, was plaintiff, and petitioner was defendant, a judgment on demurrer, upon over-ruling demurrer to plea of *res adjudicata* in said cause by the District Court was made the basis of a writ of error to the said Circuit Court of Appeals.

The decision of the appellate court, reversing the decision of the district court is made the basis of the petition for certiorari, in the instant case, as the defendant in error under the Constitution and Statutes of the

United States is not entitled to have its cause presented to this honorable court by appellate proceedings, the decision of the said Circuit Court Appeals being final.

ARGUMENT

The court will observe by reference to the transcript of the record that the basis for the plaintiff's action in the lower court was a certificate of deposit placed in petitioner's bank on November 22, 1911 (transcript p. 9). This certificate of deposit was sought to be invested with a trust on behalf of certain claimants thereto, and process by publication was regularly had, upon the plaintiff in error, under a statute of Florida which the Supreme Court of Florida has held "is broad enough to apply to any suit in equity pending in our circuit court," the suit in which the Bank deposit was sought to be invested with a trust was begun and prosecuted in the Circuit Court of Hamilton County, Fla.

Section 1866, General Statutes of Florida (Chap. 5383 (Laws of Florida), A. D. 1905.

Chapter 5913, Laws of Florida, 1909.

Such statutes have uniformly been held to be constitutional in all cases where the status of a *person* or *res* within the jurisdiction of the court is sought to be determined.

> Loaiza vs Sup. Ct. 9 L. R. A. 377.
> Pennoyer vs Neff 95 U. S. 714.
> Boswell's Lessee vs Otis, et al, U. S. 13 Law Ed. p. 165.
> Black on Judgments, Vol. 2, Sec. 793.
> Gillon vs Wear, 28 S. W., 1014.
> Arndt vs Griggs, 134 U. S., 316.
> Hamilton vs Lewis, 161 U. S. 256.

The plaintiff in error appeared before the Circuit Court for Hamilton County, Florida, attacked the constructive service upon the sole ground that the fund

could not be impressed with a trust without personal service and that no personal service was had upon the plaintiff in error.

The decision of said court was adverse to this contention whereupon the plaintiff in error from such decision appealed to the Supreme Court of Florida. In said last named court the decision of the lower court was upheld, the Supreme Court of Florida holding in effect:

(a) That the foregoing statutes providing for constructive service are broad enough to apply to the present litigation, and that service by publication under said statutes invested the lower with jurisdiction over the *res* so as to enable said court to enter a decree determining its ownership.

(b) That the appearance of the plaintiff in error by suing out an appeal from the decision of the lower court, and becoming an actor therein invested the Florida courts with jurisdiction of its person.

Rome Ins. Co. vs Corbett, 66 Fla., 138, 63 Son 833.

This judgment is, therefore, binding upon the Federal Court because it is the judgment of a court of record of general jurisdiction, and the question of jurisdiction, involving as it does, a principle of practice of the state courts, is binding and conclusive upon the Federal courts, and cannot be collaterally impeached, reviewed, or re-examined, as touching the merits of the original controversy.

Black on Judgments, Vol. 1, Sec. 270.
Ency of Law, Vol. 23, p. 1596.
Hubbard vs American Investment Co., 70 Fed., 808.
Sipe vs Coprell, 59 Federal, 970.
Colt vs Colt, 111 U. S., 556.
Duncan vs Gegan, 101 U. S., 810.

In the absence of a Federal question, the decision of a state court upon the determination of its jurisdiction

involving the construction of a statute of that state is binding and conclusive upon the Federal courts.

> Fallbrook Irrigation District vs Bradley, 164 U. S., 112.
> See also 101 U. S., 551.
> Terry vs Davis, 107 Fed., 50.

One who has voluntarily sought the judgment of the Supreme Court of a state to declare that a decree of a lower court was not only erroneous but void, although not a voluntary litigant in the trial court, is bound by the judgment of the Supreme Court, as *res judicata* and cannot attack it collaterally in a circuit court of the United States.

> Forsyth vs City of Hammond, 166 U. S., 501.

If the question of jurisdiction depends on some local statute, and it is presented to and decided by the court rendering the judgment, such decision is binding on the Federal Courts.

> See Colt vs Colt, 112 U. S., 566.
> Duncan vs Gegan, 101 U. S., 810.

That the bringing of an action upon the certificate of deposit in the U. S. District Court, under the decision of the state court in Rome Insurance Company, *supra*, is a collateral attack upon the state court judgment.

> See Supervisors vs United States, 4 Wall., 435.
> Harris vs Hardeman, 14 How., 334.

Under the decision of the Supreme Court of Florida in Rome Insurance Company vs Corbett, *supra*, the transcript showed that the plaintiff in error took no further proceeding in the state court,—permitting the cause to go to a final judgment, and this judgment is made the basis of the plea of *res adjudicata* filed in the

District Court by the petitioner (Transcript p.....). This decree has never been reversed, nor has any appeal been prosecuted therefrom to the Supreme Court of Florida, and it is therefore of full force and effect.

> Central Trust Company vs. Seasongood, 130 U. S., 32.

Counsel for plaintiff in error have argued that the decision of the Florida court cannot be made the basis of *res adjudicata* for the reason that equity acts *in personam*, and that the instant case, lacking as it does the essentials of an action *in rem* strictly considered is in effect merely a determination of the personal rights and obligations of the parties, therefore it cannot be made the basis of a decree *in rem* upon constructive service.

Unfortunately for this contention, this honorable court has held to the contrary, and the record in this case shows with respect to the certificate:

(a) That the money was not to be payable except on "return of this certificate properly endorsed."

(b) That the money was not to be removed from the bank of the petitioner under any circumstances until after November 22, 1912, nearly one year from date of deposit.

(c) That the certificate was not subject to check.

(d) That the decree of the lower court, which appears in the record (Transcript p.....) does not attempt to go further than investing the fund situate in the bank of your petitioner with a trust, and imposes no personal duty or obligation upon either of the parties.

(e) That the fund in part consisted of notes of citizens of Florida, payable in Florida.

A reference to the decisions of this court will show that where the decree confines itself to an adjudication of title to a fund before the court, it is a proceeding *quasi in rem*.

"The state has jurisdiction over property within its limits owned by non-residents, and may, therefore, subject it to payment of demands against them of its own citizens."

Freeman vs Alderson, 119 U. S., 373.
Black on Judgments, 2d Ed., Vol. 2, Sec. 793.
Arndt vs Griggs, 134 U. S., 316.
Bennett vs. Fenton, 10 L. R. A., 500.
Hamilton vs Lewis, 151 U. S., 256.
Gillon vs Wear, 28 S. W., 1014.
Hardy vs Beatty, 19 S. W., 778.
Palmer vs McCormick, 30 Fed., 82.
Purdy vs Wallace, 81 Fed., 515.
Story's Equitable Jurisprudence, 14 Ed., Sec. 93.

That the principle applies a *fortiori* where personal property involved, see an able decision by Judge Shiras, in

Loaizi vs Supreme Ct., 9 L. R. A., 377.

Under the Florida practice, appeals are allowed from interlocutory as well as final decrees.

That an appeal from a decree is an appearance vesting the court with jurisdiction over the person of appellant, see

Drew Lbr. Co. vs Walter, 45 Fla., 252; 34 Sou. Rep. 244.
Barwick vs Rouse, 43 Sou. Rep., 753.
Hayman vs Weil, 44 Sou. Rep., 176.
Rumeli vs City of Tampa, 48 Fla., 112; 37 Sou. Rep. 563.
Wilson vs Brandenburg, 16 Ark., 646.
Wylly vs Sanford, L. & T. Co., 44 Fla., 818; 33 Sou. 453.
Bustamente vs Bescher, 43 Miss., 172.
Taylor vs Sledge, 110 Tenn., 263.
Hester vs Murphrey, 1 Ark., 55.
Talbot vs Colier, 102 Ga., 550.
Swingley vs Haynes, 22 Ill., 214.
Baltimore R. Co. vs Tess 2 Ind. App., 507.

Cane vs Watson, Morr. 52. (Iowa).
McCubrey vs Lankins, 74 Minn., 302.
Gage vs Maryatt, 9 Mont., 265.
Pearson vs Kansas Mfg. Co., 14 Neb. 211.
Wood vs Randall, 5 Hill, 264.
Lyons vs Miller, 2 N. D. 1.

The theory upon which the honorable Circuit Court of Appeals reversed the decision of the district court was clearly upon the conclusion of the court that the *situs* of this fund was not in Florida, but that it followed the person of the creditor. While it is true, under the early decisions of the common law court, the maxim "*Mobilia sequuntur personam*" was held to be applicable to an ordinary debt upon the theory that personal property by reason of its nature followed the person of the owner, but the law is a progressive science, conditions with respect to ownership of property have changed with the march of commerce, and now by far the greater wealth of the nation consists in movable property, such as securities, stocks, and property of the character here involved.

The law is well settled that for the purposes of administration, garnishment or attachment, the *situs* of a debt is the home of the debtor, the debt being the *res* which gives character to the action as one in *rem*.

This has been expressly held by this court in,

C. R. I. & P. R. R. vs Strum, 174 U. S., 810.
See also Rood on Garnishment, Sec. 245.
Harvey vs Great Northern R. R., 52 N. W., 905.
Hamilton vs Rogers, 67 Michigan, ...
Shinn on Attachment and Garnishment, Sec. 490.

Any other view than that this judgment, sequestrating as it does, a particular fund, can be collaterally attacked, will be productive of confusion, e. g., while a decree protects the successful party so long as he is

within the limits of the state, is no protection anywhere else.

See Green vs Van Buskirk, 5 Wall., 307.
Wharton on Conflict of Laws, 3d Ed., Vol 1, Sec. 310.

It will be seen from examination of the transcript and decision of the Circuit Court of Appeals in the instant case that there is a divergence of opinion and ruling between the Federal and State Courts in the following particulars:

1. The Supreme Court of Florida found as a fact that the *res* was before the Circuit Court of Hamilton County, Florida, and that the said court had jurisdiction.

The said Circuit Court of Appeals in its decision decided in effect that the *situs* of the *res* is at the home of the creditor, and that the decision of the Supreme Court of Florida that its *situs* was in the bank of your petitioner, is erroneous.

2. The Supreme Court of the State of Florida in its decision determines that the appeal of the plaintiff in error was an appearance in the state court so as to vest said court with jurisdiction of its person under its construction of the Florida practice.

The Circuit Court of Appeals in its decision in the instant case in effect determines that the decision of the State Court that an appeal operated as an appearance was erroneous.

In conclusion, we respectfully submit that a fair construction of the decision which is made the basis of this petition discloses that the Circuit Court of Appeals has jurisdiction to review the decision of the District Court solely upon the ground of diversity of citizenship; that its finding and decision that the proceeding in the state

court in the case of Rome Insurance Company vs Corbett, 63 Sou. Rep. 833, was not *res adjudicata*, when set up in a plea admitted to be in proper form in the District Court, is in effect a reversal of the decision of the Supreme Court of Florida.

In rendering this decision, we respectfully submit the said Circuit Court of Appeals assumes and exercises a jurisdiction not authorized by the Constitution and Laws of the United States; a jurisdiction which could not even be exercised by this honorable court save where a Federal question is involved. This principle and the danger of the exercise of a jurisdiction not contemplated by the Constitution and Laws of the United States has been ably pointed out by this court in the cases hereinafter cited.

While it is true that this honorable court has held in some decisions, notably C. & N. W. Ry. Co. vs Osborn, 146 U. S., 355, that the right of the Supreme Court to issue writs of *certiorari* will be sparingly exercised, yet in the case of Forsyth vs Hammond, the broad doctrine is announced, "That the power of this court in *certiorari* extends to every case pending in the circuit court of appeals, and may be exercised *at any time* during such pendency."

An examination of the transcript will disclose a case of conflict of decisions, not only between judges of equal rank in our Federal judiciary, but also a case of conflict of opinion and jurisdiction between the highest court of a state of the nation and the circuit court of appeals; it is manifest also that the decision of the last named court is *final* and conclusive as *settling* the *law* of the instant case for under the decision of that tribunal nothing remains, according to the admission in the pleadings for the district court to do except to entertain jurisdiction, strike the plea of *res adjudicata* filed by the

defendant in the lower court and enter a judgment against the petitioner in the instant case.

Forsyth vs Hammond, 166 U. S., 504.
United States vs Three Friends, 166 U. S. 1.

Respectfully submitted,

Wm Wade Hampton

Counsel for Petitioner.

W. S. Hampton

S. S. Sandford

Of Counsel.

FILED
JUN 1 1920
JAMES D. MAHER,
CLERK.

In the Supreme Court of the United States

OCTOBER TERM, 1919.

No. 373

FIRST NATIONAL BANK OF JASPER, FLORIDA,
a Corporation, Petitioner,

vs.

STATE BANK OF ROME,
a Corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the

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FOR THE FIFTH CIRCUIT.

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UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

WILLIAM WADE HAMPTON,
Attorney for Petitioner,
Gainesville, Fla.

HILTON S. HAMPTON
AND S. S. SANFORD,
Of Counsel,
Tampa, Fla.

NOTICE TO COUNSEL

To Messrs. William E. Kay, John L. Doggett, L. A. Dean, I. E. Dean and Henry C. Clark, Counsel of Record in the Circuit Court of Appeals for the Respondent herein:

Please take notice that on Monday, the 4 day of October A. D. 1920, at the opening of court on that day, or as soon thereafter as petitioner may be heard, we shall submit to the Supreme Court of the United States, at its court room in the Capitol in the city of Washington, the following petition for a writ of certiorari in the case there entitled together with the brief in support thereof accompanying the same.

Dated at Tampa, Florida, this 2 day of August 1920.

WM. WADE HAMPTON,
Attorney for Petitioner.

Service of the foregoing notice, together with a copy of the accompanying petition and brief, is hereby accepted.

.....
Of Counsel for Respondent.

IN THE SUPREME COURT OF THE

UNITED STATES.

OCTOBER TERM, 1919.

No.....

FIRST NATIONAL BANK OF JASPER, FLORIDA,
a Corporation, Petitioner,

vs.

STATE BANK OF ROME,
a Corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of The First National Bank of Jasper, Florida, a corporation, respectfully shows unto this Honorable Court as follows:

FIRST: This cause involves a conflict between the Supreme Court of the State of Florida and the United States Circuit Court of Appeals in and for the Fifth Circuit.

SECOND: This cause was instituted against your petitioner in the United States District Court in and for the Southern District of Florida on the 27th day of January, A. D. 1913, by the respondent herein, seeking to recover on certain certificates of deposit issued by your petitioner (Transcript p. 1). The jurisdiction of the trial court was based on diversity of citizenship. (Transcript p. 3).

THIRD: Prior to the institution of this action in the United States District Court as aforesaid on to-wit the 3rd day of January, A. D. 1913, there were filed in the Circuit Court in and for Hamilton County, Florida, a court of general jurisdiction, bills of complaint by J. H. Corbitt and others, in separate suits, against Rome Insurance Company, American Bank and Trust Company, and First National Bank of Rome, Georgia, and against your petitioner, (Transcript p. 61); that in and by said bills of complaint it was prayed that certain certificates of deposit (being the same certificates of deposit sued on in this cause) be declared to be null and void, and that your petitioner be restrained from paying the proceeds thereof to respondent in this cause, or any one for it (Transcript p. 68); that said certificates of deposit (Transcript p. 8) are identical in all respects save the numbers thereof and the amounts vary, and the names of the persons depositing the proceeds of same, said certificates being in words and figures following, to-wit:

CERTIFICATE OF DEPOSIT.

No. 895.

Jasper, Fla., Nov. 25, 1911.

THE FIRST NATIONAL BANK, JASPER, FLA.

This certifies that.....has deposited in this Bank.....Dollars, payable to the order of American Bank and Trust Co.

Trustee, Rome, Ga. in current funds on return of this certificate properly endorsed with interest at four per cent per annum (not over.....Dollars). No interest paid for fraction of a month. Not payable until Nov.....1912.

C. GILBERT, Cashier.

8.....

8.....

That in said suits in the said circuit court in and for Hamilton County, Florida, service of process was had upon Respondent (the original plaintiff herein) by publication, under the provisions of Section 1866 General Statutes of Florida and Chap. 5913 Laws of Florida 1909 (Transcript p. 57); that your petitioner, a resident of the State of Florida, was personally served with process.

That upon the return day fixed in the order of publication of process, Respondent (Original plaintiff herein) filed special appearances and motions to quash the service (Transcript p. 89) which motions were in substance confined to the one ground that the proceedings brought in the state court were actions *in personam* and that there had been no personal service on said Respondent. These motions having come on to be heard before the Circuit Court of Hamilton County, Florida, said court on the 3rd day of April, A. D. 1913, did deny said motions.

Thereupon, on the 10th day of April, A. D. 1913, stipulations were entered into between solicitors for the respective parties in the suits in the State court (Transcript p. 92) providing that all proceedings in said suits be stayed pending the prosecution of an appeal to the Supreme Court of Florida in the case of J. H. Corbitt vs Rome Insurance Company, et als., which appeal was from orders of the State court denying similar motions to quash service by publication on similar grounds, and which appeal under the decisions of the Supreme Court of Florida constituted a general appear-

ance by the appellant (Respondents herein); and it was further provided in and by said stipulation (Transcript p. 92) that the ultimate decision of the said appeal in said case of J. H. Corbitt vs Rome Insurance Company, et als., would be decisive of the validity of the service by publication on the defendants in those suits.

That at the June term of the Supreme Court of Florida, said Supreme Court affirmed the order of the lower court in the case of J. H. Corbitt vs Rome Insurance Company, et als., (Transcript p. 86) in words and figures a sfollows, to-wit:

"In the Supreme Court of Florida,

June Term, A. D. 1913.

"Rome Insurance Company, a Georgia Corporation, and other Appellants,

vs.

J. H. Corbitt, Appellee.

Hamilton County.

COCKREL, J.:

"A bill was filed in the Circuit Court for Hamilton County against local defendants and also certain non-residents corporations seeking to impound a fund in that county arising out of an alleged fraudulent transaction consummated in that county. Constructive service, in perfect accordance with the statute was had by publication, and the non-residents corporations appeared specially to quash the service upon the theory that the sole relief prayed was *in personam*, and that therefore the statute authorizing constructive service by publication does not apply. This motion having been denied these non-residents have sued out what they term a special appeal.

"It may well be that this appeal so operates as a general appearance in the circuit court as to render the question before us a moot one, but the Appellee does not ask us to so hold, and it appears that this is but a test case, upon the decision of which many other cases in that court are depending.

"The bill confined its prayer to an adjudication of the funds sought to be impounded, and does not pray for a general personal decree against these non-residents

and we are not to assume from the face of the bill that the Circuit Court will enter an unauthorized decree; and we have not before us any such question of jurisdiction as was involved in the case of Pennoyer vs Neff, 95 U. S., 714.

82. "The purpose of the statute authorizing constructive service by publication is to notify non-residents of the pending suit so that they may, if they care to do so, come into the case and if the statute be followed, there is no right in the non-resident to quash this notice; he has his right if not waived to object should the court thereafter commit an error against him.

"Our constructive service statute is broad enough to apply to any suit in equity pending in our Circuit Court, and as has been said in Kilpatrick vs Post, 53 N. J. Eq., 591 text 597 32 Atl. Rep. 267, cannot be confined in its operation to the cases where the court might make final decree or judgment. Further that Court says: 'It was not intended that the question of the power to enter the ultimate decree or judgment should enter into the question of the right to give notice of the suit to a non-resident, or that this question of jurisdiction should be settled on a motion to discharge the order of publication. The complainant is entitled to have the question of jurisdiction settled by a final decree.'

"We are not to be understood as holding that the court might not quash a service by publication, if the bill upon its face showed that it was clearly a common law cause of action, and that the resort to the equity side of the court was a subterfuge; the bill before us does not present that case."

"The Order is affirmed:

"Shackleford, C. J. and Taylor, Hocker and Whitfield, J. J. concur."

That thereafter Respondent herein took no further part in the proceedings in the State Court (Transcript p. 18) and on the 14th day of July, A. D. 1914, final decrees were entered in the state court (Transcript p 18) which decrees adjudged that the certificates of deposits therein mentioned (being the same certificates of deposit herein sued upon) were void and of no effect

and enjoining your petitioner from paying the proceeds thereof to Respondent herein or to any one for it; that said decrees and each of them are still of full force and effect.

FOURTH: That on the 3rd day of August, A. D. 1914, in this suit instituted in the United States District Court in and for the Southern District of Florida by Respondent herein against your petitioner, your petitioner did file pleas of *res adjudicata*, (Transcript p. 11) setting up the decrees entered in the Circuit Court in and for Hamilton County, Florida, which decrees adjudged the certificates of deposit herein sued upon to be void and of no effect, and which enjoined your petitioner from paying the proceeds thereof to the plaintiff below (Respondent herein) or to any one for it. Certified copies of said decrees were attached to said pleas (Transcript p. 18).

FIFTH: That on the 7th day of September, A. D. 1914, the plaintiff in the trial court, Respondent herein, filed a demurrer to said pleas (Transcript p. 33) which said demurrer coming on to be heard before the District Judge of said Court, was on the 12th day of January, A. D. 1915, over-ruled, (Transcript p. 36).

SIXTH: That thereafter, on the 15th day of June, A. D. 1915, said Respondent filed replications to said pleas, (Transcript p. 38) setting up in substance by said replications that the chancery suits mentioned in your petitioner's pleas, and which are fully described in the third paragraph of this petition, were action *in personam;* that no personal service was ever had on said Respondent herein; that it did not at any time or any manner appear in said suits, except specially, to contest the service by publication therein made, and that it in no way waived the want of jurisdiction of the State court over its person; there were attached to said replication copies of the records in the said Chancery suits mentioned, (Transcript p. 47-56).

SEVENTH: That on the 5th day of July, A. D. 1915, your petitioner filed a motion to strike (Transcript p. 98-99) and a demurrer (Transcript p. 99) to said replications which said motion and demurrer coming on to be heard by the Court, the said demurrer was, on the 2nd day of February, A. D. 1917, sustained as to each of said replications (Transcript 102).

EIGHTH: That on the 9th day of January, A. D. 1919, the plaintiff in the trial court filed a declination to plead further (Transcript p. 104). Thereupon on the 9th day of January, A. D. 1919, final judgment was entered in favor of your petitioner (Transcript p. 105).

NINTH: That from said judgment said Respondent sued out a writ of error to the Circuit Court of Appeals of the United States for the Fifth Circuit which court on the 10th day of March, A. D. 1920, reversed the judgment of the District Court, holding in effect:

(a) That the Circuit Court in and for Hamilton County, Florida, acquired no jurisdiction over the person of respondent herein, by the service by publication made in said suits.

(b) That said Circuit Court in and for Hamilton County, Florida, acquired no jurisdiction over the fund or *res* sought to be impounded in said chancery suits, as the same was not under the control of the Court.

(c) That the Florida Court had no jurisdiction to render the said decrees as to non-residents.

(d) That the said court did not purport to determine the personal liability of your petitioner to the plaintiff on the said certificates of deposit.

(e) That the prosecution of the appeals by the respondent herein to the Florida Supreme Court, did not amount to general appearances in the State Court of Florida and this holding is in conflict with the decision of the Supreme Court of Florida.

TENTH: That a certified copy of the entire record in this cause in the Circuit Court of Appeals of the United States for the Fifth Circuit is hereby furnished, attached hereto and made a part of this petition, and marked Exhibit "A," all in compliance with Rule 37 of this Honorable Court.

ELEVENTH: Your petitioner is advised and believes that the aforesaid judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous, and that this honorable court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such case made and provided, said case being final in said United States Circuit Court of Appeals by the provisions contained in Section 128 of the United States Judicial Code.

TWELFTH: Your petitioner further represents unto this Honorable Court that the aforesaid judgment of the United States Circuit Court of Appeals for the Fifth Circuit presents a conflict of State and Federal jurisdiction and in effect reverses the decisions of the Supreme Court of the State of Florida in the cases of Rome Insurance Company, et als., vs B. F. Carter (63 Sou. 834) and Rome Insurance Company et als. vs J. H. Corbitt, (63 Fla. 833) and denies them full faith and credit, for the following reasons:

(a) The United States Circuit Court of Appeals held that the prosecutions of the appeals in the State Court did not amount to general appearances, whereas the Florida Supreme Court, following the established rule of practice in that State, held that the prosecution of an appeal constitutes a general appearance in the lower court.

(b) The Florida Supreme Court held that the service of publication upon Respondent herein original plaintiff in this action, was valid so as to bring its person within the jurisdiction of the court for the relief

prayed in the bills of complaint. The Circuit Court of Appeals held otherwise.

(c) The Florida Supreme Court held that the bills of complaint confined their prayers to an adjudication of a fund sought to be impounded, and that said fund was within the jurisdiction and control of the State Court; the said Circuit Court of Appeals by its decree in effect denies this.

THIRTEENTH: Your petitioner further represents that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous on the following grounds:

(a) The fund impounded by the decrees in the State Court had its *situs* in the State of Florida, and not in the State of Georgia; because:

(aa) The money was not to be payable except "on the return of this certificate properly endorsed."

(bb) The certificate was not subject to check.

(cc) The deposit was made for a specific purpose and was not the part of a general fund.

(dd) The *situs* of a debt, for the purpose of administration and garnishment, is the home of the debtor.

(b) The proceedings in the State Court, the decrees in which were set up as a defense by your petitioner in the District Court, were proceedings *in rem*, to the validity of which personal service is unnecessary.

(c) If any defects existed in the State Court's jurisdiction over Respondent, such defects, under the rulings of the Supreme Court of Florida, were waived by the prosecution of the appeal to the Florida Supreme Court.

FOURTEENTH: Your petitioner further represents that no question was raised by the plaintiff, either in the District Court or in the Circuit Court of Appeals as to the sufficiency of your petitioner's pleas of *res adjudicata*, except that the proceedings in the State Court were actions *in personam* and that no personal service was had on the plaintiff, one of the defendants in those proceedings.

FIFTEENTH: Your petitioner further represents that the said United States Circuit Court of Appeals for the Fifth Circuit in denying to your petitioner the benefit of the adjudication of the Supreme Court of Florida of a statute of that state, assumed a jurisdiction which not even the Supreme Court of the United States has power to assume.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals in and for the Fifth Circuit, commanding the said court to certify and send to this Court, on a day certain therein to be designated, a full and complete transcript of the record and all proceedings of the said cause against said respondent, to the end that the said case may be reviewed and determined by this court, as provided in and by Section 240 of the United States Judicial Code, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in comformity with said provision of the Judicial Code, and that the said judgment of said Circuit Court of Appeals in said case, and every part thereof, may be reversed by this Honorable Court.

And petitioner will ever pray, etc.

Wm. Wade Hampton

Attorney and Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

THE FIRST NATIONAL BANK OF JASPER, FLORIDA,
Petitioner

vs.

THE STATE BANK OF ROME, GEORGIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE UNITED STATES FOR FIFTH CIRCUIT

BRIEF OF PETITIONER, FIRST NATIONAL BANK OF JASPER, FLORIDA.

STATEMENT

The foregoing is a cause originating in the District Court of the United States for the Southern District of Florida, wherein First National Bank of Rome, Georgia, was plaintiff, and petitioner was defendant, a judgment on demurrer, upon over-ruling demurrer to plea of *res adjudicata* in said cause by the District Court was made the basis of a writ of error to the said Circuit Court of Appeals.

The decision of the appellate court, reversing the decision of the district court is made the basis of the petition for certiorari, in the instant case, as the defendant in error under the Constitution and Statutes of the

United States is not entitled to have its cause presented to this honorable court by appellate proceedings, the decision of the said Circuit Court Appeals being final.

ARGUMENT

The court will observe by reference to the transcript of the record that the basis for the plaintiff's action in the lower court was a certificate of deposit placed in petitioner's bank on November 22, 1911 (transcript p. 9). This certificate of deposit was sought to be invested with a trust on behalf of certain claimants thereto, and process by publication was regularly had, upon the plaintiff in error, under a statute of Florida which the Supreme Court of Florida has held "is broad enough to apply to any suit in equity pending in our circuit court," the suit in which the Bank deposit was sought to be invested with a trust was begun and prosecuted in the Circuit Court of Hamilton County, Fla.

Section 1866, General Statutes of Florida (Chap. 5393 (Laws of Florida), A. D. 1905.

Chapter 5913, Laws of Florida, 1909.

Such statutes have uniformly been held to be constitutional in all cases where the status of a *person* or *res* within the jurisdiction of the court is sought to be determined.

> Loaiza vs Sup. Ct. 9 L. R. A. 377.
> Pennoyer vs Neff 95 U. S. 714.
> Boswell's Lessee vs Otis, et al, U. S. 13 Law Ed. p. 165.
> Black on Judgments, Vol. 2, Sec. 793.
> Gillon vs Wear, 28 S. W., 1014.
> Arndt vs Griggs, 134 U. S., 316.
> Hamilton vs Lewis, 161 U. S. 256.

The plaintiff in error appeared before the Circuit Court for Hamilton County, Florida, attacked the constructive service upon the sole ground that the fund

could not be impressed with a trust without personal service and that no personal service was had upon the plaintiff in error.

The decision of said court was adverse to this contention whereupon the plaintiff in error from such decision appealed to the Supreme Court of Florida. In said last named court the decision of the lower court was upheld, the Supreme Court of Florida holding in effect:

(a) That the foregoing statutes providing for constructive service are broad enough to apply to the present litigation, and that service by publication under said statutes invested the lower with jurisdiction over the *res* so as to enable said court to enter a decree determining its ownership.

(b) That the appearance of the plaintiff in error by suing out an appeal from the decision of the lower court, and becoming an actor therein invested the Florida courts with jurisdiction of its person.

Rome Ins. Co. vs Corbett, 66 Fla., 438, 63 Sou 833.

This judgment is, therefore, binding upon the Federal Court because it is the judgment of a court of record of general jurisdiction, and the question of jurisdiction, involving as it does, a principle of practice of the state courts, is binding and conclusive upon the Federal courts, and cannot be collaterally impeached, reviewed, or re-examined, as touching the merits of the original controversy.

Black on Judgments, Vol. 1, Sec. 270.
Ency of Law, Vol. 23, p. 1596.
Hubbard vs American Investment Co., 70 Fed., 808.
Sipe vs Coprell, 59 Federal, 970.
Colt vs Colt, 111 U. S., 556.
Duncan vs Gegan, 101 U. S., 810.

In the absence of a Federal question, the decision of a state court upon the determination of its jurisdiction

involving the construction of a statute of that state is binding and conclusive upon the Federal courts.

> Fallbrook Irrigation District vs Bradley, 164 U. S., 112.
> See also 101 U. S., 551.
> Terry vs Davis, 107 Fed., 50.

One who has voluntarily sought the judgment of the Supreme Court of a state to declare that a decree of a lower court was not only erroneous but void, although not a voluntary litigant in the trial court, is bound by the judgment of the Supreme Court, as *res judicata* and cannot attack it collaterally in a circuit court of the United States.

> Forsyth vs City of Hammond, 166 U. S., 504.

If the question of jurisdiction depends on some local statute, and it is presented to and decided by the court rendering the judgment, such decision is binding on the Federal Courts.

> See Colt vs Colt, 112 U. S., 566.
> Duncan vs Gegan, 101 U. S., 810.

That the bringing of an action upon the certificate of deposit in the U. S. District Court, under the decision of the state court in Rome Insurance Company, *supra*, is a collateral attack upon the state court judgment,

> See Supervisors vs United States, 4 Wall., 435.
> Harris vs Hardeman, 14 How. 334.

Under the decision of the Supreme Court of Florida in Rome Insurance Company vs Corbett, *supra*, the transcript showed that the plaintiff in error took no farther proceeding in the state court,—permitting the cause to go to a final judgment, and this judgment is made the basis of the plea of *res adjudicata* filed in the

District Court by the petitioner (Transcript p.....). This decree has never been reversed, nor has any appeal been prosecuted therefrom to the Supreme Court of Florida, and it is therefore of full force and effect.

> Central Trust Company vs. Seasongood, 130 U. S., 32.

Counsel for plaintiff in error have argued that the decision of the Florida court cannot be made the basis of *res adjudicata* for the reason that equity acts *in personam*, and that the instant case, lacking as it does the essentials of an action *in rem* strictly considered is in effect merely a determination of the personal rights and obligations of the parties, therefore it cannot be made the basis of a decree *in rem* upon constructive service.

Unfortunately for this contention, this honorable court has held to the contrary, and the record in this case shows with respect to the certificate:

(a) That the money was not to be payable except on "return of this certificate properly endorsed."

(b) That the money was not to be removed from the bank of the petitioner under any circumstances until after November 22, 1912, nearly one year from date of deposit.

(c) That the certificate was not subject to check.

(d) That the decree of the lower court, which appears in the record (Transcript p.....) does not attempt to go further than investing the fund situate in the bank of your petitioner with a trust, and imposes no personal duty or obligation upon either of the parties.

(e) That the fund in part consisted of notes of citizens of Florida, payable in Florida.

A reference to the decisions of this court will show that where the decree confines itself to an adjudication of title to a fund before the court, it is a proceeding *quasi in rem*.

"The state has jurisdiction over property within its limits owned by non-residents, and may, therefore, subject it to payment of demands against them of its own citizens."

Freeman vs Alderson, 119 U. S., 373.
Black on Judgments, 2d Ed., Vol. 2, Sec. 793.
Arndt vs Griggs, 134 U. S., 316.
Bennett vs. Fenton, 10 L. R. A., 500.
Hamilton vs Lewis, 151 U. S., 256.
Gillon vs Wear, 28 S. W., 1014.
Hardy vs Beatty, 19 S. W., 778.
Palmer vs McCormick, 30 Fed., 82.
Purdy vs Wallace, 81 Fed., 515.
Story's Equitable Jurisprudence, 14 Ed., Sec. 93.

That the principle applies a *fortiori* where personal property involved, see an able decision by Judge Shiras, in

Louizi vs Supreme Ct., 9 L. R. A., 377.

Under the Florida practice, appeals are allowed from interlocutory as well as final decrees.

That an appeal from a decree is an appearance vesting the court with jurisdiction over the person of appellant, see

Drew Lbr. Co. vs Walter, 45 Fla., 252; 34 Sou. Rep. 244.
Barwick vs Rouse, 43 Sou. Rep., 753.
Hayman vs Weil, 44 Sou. Rep., 176.
Rumeli vs City of Tampa, 48 Fla., 112; 37 Sou. Rep. 563.
Wilson vs Brandenburg, 16 Ark., 646.
Wylly vs Sanford, L. & T. Co., 44 Fla., 818; 33 Sou. 453.
Bustamente vs Bescher, 43 Miss., 172.
Taylor vs Sledge, 110 Tenn., 263.
Hester vs Murphrey, 1 Ark., 55.
Talbot vs Colier, 102 Ga., 550.
Swingley vs Haynes, 22 Ill., 214.
Baltimore R. Co. vs Tess 2 Ind. App., 507.

Cane vs Watson, Morr. 52. (Iowa).
McCubrey vs Lankins, 74 Minn., 302.
Gage vs Maryatt, 9 Mont., 265.
Pearson vs Kansas Mfg. Co., 14 Neb. 211.
Wood vs Randall, 5 Hill, 264.
Lyons vs Miller, 2 N. D. 1.

The theory upon which the honorable Circuit Court of Appeals reversed the decision of the district court was clearly upon the conclusion of the court that the *situs* of this fund was not in Florida, but that it followed the person of the creditor. While it is true, under the early decisions of the common law court, the maxim "*Mobilia sequuntur personam*" was held to be applicable to an ordinary debt upon the theory that personal property by reason of its nature followed the person of the owner, but the law is a progressive science, conditions with respect to ownership of property have changed with the march of commerce, and now by far the greater wealth of the nation consists in movable property, such as securities, stocks, and property of the character here involved.

The law is well-settled that for the purposes of administration, garnishment or attachment, the *situs* of a debt is the home of the debtor, the debt being the *res* which gives character to the action as one in *rem*.

This has been expressly held by this court in,

C. R. I. & P. R. R. vs Strum, 174 U. S., 810.
See also Rood on Garnishment, Sec. 245.
Harvey vs Great Northern R. R., 52 N. W., 905.
Hamilton vs Rogers, 67 Michigan, ...
Shinn on Attachment and Garnishment, Sec. 490.

Any other view than that this judgment, sequestrating as it does, a particular fund, can be collaterally attacked, will be productive of confusion, e. g., while a decree protects the successful party so long as he is

within the limits of the state, is no protection anywhere else.

> See Green vs Van Buskirk, 5 Wall., 307.
> Wharton on Conflict of Laws, 3d Ed., Vol 1, Sec. 310.

It will be seen from examination of the transcript and decision of the Circuit Court of Appeals in the instant case that there is a divergence of opinion and ruling between the Federal and State Courts in the following particulars:

1. The Supreme Court of Florida found as a fact that the *res* was before the Circuit Court of Hamilton County, Florida, and that the said court had jurisdiction.

The said Circuit Court of Appeals in its decision decided in effect that the *situs* of the *res* is at the home of the creditor, and that the decision of the Supreme Court of Florida that its *situs* was in the bank of your petitioner, is erroneous.

2. The Supreme Court of the State of Florida in its decision determines that the appeal of the plaintiff in error was an appearance in the state court so as to vest said court with jurisdiction of its person under its construction of the Florida practice.

The Circuit Court of Appeals in its decision in the instant case in effect determines that the decision of the State Court that an appeal operated as an appearance was erroneous.

In conclusion, we respectfully submit that a fair construction of the decision which is made the basis of this petition discloses that the Circuit Court of Appeals has jurisdiction to review the decision of the District Court solely upon the ground of diversity of citizenship; that its finding and decision that the proceeding in the state

court in the case of Rome Insurance Company vs Corbett, 63 Sou. Rep. 833, was not *res adjudicata*, when set up in a plea admitted to be in proper form in the District Court, is in effect a reversal of the decision of the Supreme Court of Florida.

In rendering this decision, we respectfully submit the said Circuit Court of Appeals assumes and exercises a jurisdiction not authorized by the Constitution and Laws of the United States; a jurisdiction which could not even be exercised by this honorable court save where a Federal question is involved. This principle and the danger of the exercise of a jurisdiction not contemplated by the Constitution and Laws of the United States has been ably pointed out by this court in the cases hereinafter cited.

While it is true that this honorable court has held in some decisions, notably C. & N. W. Ry. Co. vs Osborn, 146 U. S., 355, that the right of the Supreme Court to issue writs of *certiorari* will be sparingly exercised, yet in the case of Forsyth vs Hammond, the broad doctrine is announced, "That the power of this court in *certiorari* extends to every case pending in the circuit court of appeals, and may be exercised *at any time* during such pendency."

An examination of the transcript will disclose a case of conflict of decisions, not only between judges of equal rank in our Federal judiciary, but also a case of conflict of opinion and jurisdiction between the highest court of a state of the nation and the circuit court of appeals; it is manifest also that the decision of the last named court is *final* and conclusive as *settling* the *law* of the instant case for under the decision of that tribunal nothing remains, according to the admission in the pleadings for the district court to do except to entertain jurisdiction, strike the plea of *res adjudicata* filed by the

defendant in the lower court and enter a judgment against the petitioner in the instant case.

Forsyth vs Hammond, 166 U. S., 504.
United States vs Three Friends, 166 U. S. 1.

Respectfully submitted,

Wm. Wade Hamilton

Counsel for Petitioner.

H. L. Hamilton

A. L. Sandford

Of Counsel.